

**United States Department of Labor
Employees' Compensation Appeals Board**

A.C., Appellant

and

**DEPARTMENT OF VETERANS AFFAIRS,
VETERANS HEALTH ADMINISTRATION,
Canandaigua, NY, Employer**

)
)
)
)
)
)
)
)
)
)
)

**Docket No. 15-297
Issued: May 12, 2015**

Appearances:

*Jeffrey P. Zeelander, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On November 14, 2014 appellant filed a timely appeal from a June 9, 2014 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant met his burden of proof to establish an emotional condition in the performance of duty.

FACTUAL HISTORY

On January 9, 2013 appellant, then a 45-year-old lead police officer, filed an occupational disease claim alleging that he sustained high blood pressure due to the "anxiety and stress of the job." He stopped work on January 2, 2013.

¹ 5 U.S.C. §§ 8101-8193.

In a January 24, 2013 development letter, OWCP requested that appellant submit additional factual and medical evidence in support of his claim, including a detailed description of the implicated work factors and medical evidence describing his medical condition with an explanation of the cause of any such condition.

Appellant submitted a January 2, 2013 emergency room report in which an attending physician assistant reported blood pressure of 156/100 when he first arrived, but that it was 136/88 after he had settled down for a while. The physician assistant diagnosed mild anemia and headache. In other notes from that visit, a registered nurse noted that appellant had a history of hypertension.

In a May 29, 2013 decision, OWCP denied appellant's emotional condition claim because he failed to establish any compensable work factors. It noted that he only provided a vague and general statement that job-related stress caused his claimed medical condition.

By letter dated October 30, 2013, appellant requested reconsideration of his claim and described the incidents and conditions at work which he believed caused a stress-related condition. He alleged that in late 2010, while suffering from bladder cancer caused by his military service, the employing establishment mishandled his request for a transfer to another position. Appellant received his requested transfer to Canadaigua, NY, in August 2011 but was immediately transferred again to Rochester, NY, based on a false assertion by management that he did not have enough seniority to remain in the Canadaigua position. He alleged that this action was part of retaliatory and discriminatory actions that lasted for five months and that he was brought before an interview panel whose members attempted to discredit his character. In a written report, management officials allegedly called him unprofessional and accused him of being a liar. Appellant indicated that, in early December 2011, during his yearly psychological evaluation he lost confidence in the ability and character of Jay Supnick, the civilian contractor carrying out the evaluation, when he denied knowing about a coworker who had failed his entrance examination. During an early March 2012 evaluation, Mr. Supnick misinterpreted a comment that appellant had made about a former supervisor's propensity for violence and reacted as though appellant had made an "emotionally unstable remark." Appellant indicated that Mr. Supnick became visibly irate and requested that he leave the room so that he could speak to the police chief. He stated that he was wrongly removed from service the day after this evaluation, but that Mr. Supnick denied that he was responsible for removing him from service. Appellant was placed on administrative leave until March 14, 2012 when he was recommended for discontinued service.

In his October 30, 2013 letter, appellant further alleged that between March and October 2012 he witnessed numerous criminal actions by employees and patients, but that management did not take steps to prevent such actions. He filed complaints with the Office of the Inspector General for the employing establishment concerning fraud, waste, and abuse, but the response of the factfinders was that the employing establishment was "not responsible for the actions of others." Appellant's promotion to the lieutenant rank in October 2012 had been improperly delayed by a human resources official who made remarks that made him feel uncomfortable. He alleged that after his promotion he was exposed to additional acts of retaliation by management and placed in hostile environments. In early January 2013, appellant experienced an emotional incident when he was abandoned at work after other officers called in sick and a police officer assigned to the union office was hostile toward him. Beginning

January 23, 2013, he was wrongly placed on administrative leave for eight months, a situation which exacerbated his prostate and bone cancers. Appellant alleged that he was placed in a hostile work environment when he returned to work in August 2013, and that human resource officials stole his military health records from the mail. Also, a union member stated that appellant belonged in a secured unit for the mentally unstable. Appellant alleged that a number of employees who had harassed him had been removed from their jobs or were being investigated.²

Appellant submitted an October 15, 2012 letter to the chief of his workplace in which he asserted that management officials made misleading statements about his military-connected health issues, mental health, and fitness for duty. He was subjected to harassment and discrimination by these officials and the human resources office failed to notify him about opportunities for advancement. In a November 25, 2012 e-mail, appellant discussed a tort claim he filed with the Office of General Counsel of the employing establishment alleging that he received improper medical care for his bladder cancer from a physician who worked for the employing establishment.

In January 24 and May 6, 2013 e-mails to Eric Shinseki, then Secretary of the employing establishment, appellant asserted that a human resources manager at the employing establishment subjected him to sexual advances and that management illegally removed him from active service. Appellant generally alleged that he was subjected to harassment after he began working at the employing establishment.

In a May 24, 2013 statement, Steve Barone, a coworker, described a meeting on that date with Brian Wert, a union official, and several others. He asserted that Mr. Wert called appellant “crazy” and “nuts” and stated that he “could easily be a patient [in 3 Building].” Mr. Wert also stated that appellant was “certifiable” and that coworkers felt unsafe around him. In a June 19, 2013 e-mail to Craig Howard, the Medical Center Director for the employing establishment in Canandaigua, appellant alleged that an unspecified person used vulgar language to tell him to shut up when he was contacted regarding his return to duty. He indicated that Mr. Wert and others subjected him to harassment, retaliation, discrimination, sexual harassment, privacy violations, civil rights violations, and unfounded accusations.³

Appellant submitted several medical reports of Dr. Aurelian Niculescu, an attending Board-certified psychiatrist, including an October 8, 2013 report in which he diagnosed major depressive disorder, generalized anxiety disorder, and anxiety disorder with mixed features of panic disorder and agoraphobia. Dr. Niculescu posited that these conditions were aggravated by appellant’s being placed on administrative leave at work.

In a June 9, 2014 decision, OWCP denied appellant’s emotional condition claim because he failed to establish any compensable work factors. It found that he had not submitted sufficient corroborative documentation, such as witness statements or grievance findings that

² In a separate undated statement, appellant generally alleged that he had suffered numerous acts of discrimination, harassment, hostility, false accusations and “administrative/managerial harassing actions.”

³ On June 20, 2013 Mr. Howard responded that no removal action was being contemplated regarding his employment.

documented his claims of harassment, discrimination, and other acts of wrongdoing by the employing establishment.

LEGAL PRECEDENT

Workers' compensation law does not apply to each and every injury or illness that is somehow related to an employee's employment. There are situations where an injury or an illness has some connection with the employment but nevertheless does not come within the concept or coverage of workers' compensation. Where the disability results from an employee's emotional reaction to his or her regular or specially assigned duties or to a requirement imposed by the employment, the disability comes within the coverage of FECA.⁴ On the other hand, the disability is not covered where it results from such factors as an employee's fear of a reduction-in-force or his or her frustration from not being permitted to work in a particular environment or to hold a particular position.⁵

Administrative and personnel matters, although generally related to the employee's employment, are administrative functions of the employer rather than the regular or specially assigned work duties of the employee and are not covered under FECA.⁶ However, the Board has held that, where the evidence establishes error or abuse on the part of the employing establishment in what would otherwise be an administrative matter, coverage will be afforded.⁷ In determining whether the employing establishment has erred or acted abusively, the Board will examine the factual evidence of record to determine whether the employing establishment acted reasonably.⁸

To the extent that disputes and incidents alleged as constituting harassment and discrimination by supervisors and coworkers are established as occurring and arising from appellant's performance of his or her regular duties, these could constitute employment factors.⁹ However, for harassment or discrimination to give rise to a compensable disability under FECA, there must be evidence that harassment or discrimination did in fact occur. Mere perceptions of harassment or discrimination are not compensable under FECA.¹⁰

Appellant has the burden of establishing by the weight of the reliable, probative and substantial evidence that the condition for which he claims compensation was caused or adversely affected by employment factors.¹¹ This burden includes the submission of a detailed

⁴ *Lillian Cutler*, 28 ECAB 125 (1976).

⁵ *Gregorio E. Conde*, 52 ECAB 410 (2001).

⁶ *Matilda R. Wyatt*, 52 ECAB 421 (2001); *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 556 (1991).

⁷ *William H. Fortner*, 49 ECAB 324 (1998).

⁸ *Ruth S. Johnson*, 46 ECAB 237 (1994).

⁹ *David W. Shirey*, 42 ECAB 783, 795-96 (1991); *Kathleen D. Walker*, 42 ECAB 603, 608 (1991).

¹⁰ *Jack Hopkins, Jr.*, 42 ECAB 818, 827 (1991).

¹¹ *Pamela R. Rice*, 38 ECAB 838, 841 (1987).

description of the employment factors or conditions which he believes caused or adversely affected a condition for which compensation is claimed and a rationalized medical opinion relating the claimed condition to compensable employment factors.¹²

In cases involving emotional conditions, the Board has held that, when working conditions are alleged as factors in causing a condition or disability, OWCP, as part of its adjudicatory function, must make findings of fact regarding which working conditions are deemed compensable factors of employment and are to be considered by a physician when providing an opinion on causal relationship and which working conditions are not deemed factors of employment and may not be considered.¹³ If a claimant does implicate a factor of employment, OWCP should then determine whether the evidence of record substantiates that factor. When the matter asserted is a compensable factor of employment and the evidence of record establishes the truth of the matter asserted, OWCP must base its decision on an analysis of the medical evidence.¹⁴ Causal relationship is a medical issue and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence which includes a physician's detailed explanation regarding the causal relationship between the claimant's diagnosed condition and the compensable employment factors.¹⁵

ANALYSIS

Appellant alleged that the employing establishment sustained an emotional condition as a result of a number of employment incidents and conditions. OWCP denied his emotional condition claim because he had failed to establish any compensable employment factors. The Board must, thus, initially review whether these alleged incidents and conditions of employment are covered employment factors under the terms of FECA. The Board notes that appellant's allegations do not pertain to his regular or specially assigned duties under *Cutler*.¹⁶ Rather, appellant has alleged error and abuse in administrative matters and harassment and discrimination on the part of his supervisors.

Appellant alleged that his employer committed wrongdoing by mishandling his transfer to another work location, violating his privacy by improperly handling and discussing his medical records, and wrongly placing him on administration leave. He also alleged improper actions with respect to carrying out improper investigatory actions which impugned his character, ignoring his claims of fraud and waste, mishandling his annual psychological evaluation, and allowing him to work on one occasion without adequate coworker support. Such administrative and personnel matters, although generally related to the employee's employment,

¹² *Effie O. Morris*, 44 ECAB 470, 473-74 (1993).

¹³ *See Norma L. Blank*, 43 ECAB 384, 389-90 (1992).

¹⁴ *Id.*

¹⁵ *Donna Faye Cardwell*, 41 ECAB 730, 741-42 (1990).

¹⁶ *See supra* note 4. On appeal counsel asserted that appellant implicated work duties as causing his claimed stress-related condition. However, the Board has reviewed appellant's statements of records and notes that he has not implicated any work duties in this regard.

are administrative functions of the employer rather than the regular or specially assigned work duties of the employee and are not covered under FECA. However, the Board has held that, where the evidence establishes error or abuse on the part of the employing establishment in what would otherwise be an administrative matter, coverage will be afforded.¹⁷

Appellant has not submitted sufficient evidence to establish that the employing establishment committed error or abuse with regard to these matters. He did not submit the findings of any grievances or complaints showing that the employing establishment had been found to have committed wrongdoing with respect to administrative or personnel actions.¹⁸ Appellant submitted various e-mails and letters in which he provided additional details about his claims of employing establishment wrongdoing in administrative and personnel matters, but he did not submit corroborative evidence to support the assertions contained in these documents. For these reasons, he has not established a compensable work factor with respect to administrative or personnel matters.

Appellant claimed that he was subjected to harassment and discrimination at work. He generally alleged that managers and others subjected him to retaliatory actions, privacy, and civil rights violations, sexual harassment, and hostile work environments. Appellant further claimed that Mr. Wert, a union official, stated during a meeting with management officials and others that he was “crazy” and “nuts” and “could easily be a patient [in 3 Building].” He claimed that, in a written report, managers officials wrongly called him unprofessional and a liar and that his character was unfairly impugned during an investigatory meeting.

The Board finds that appellant did not submit sufficient evidence to establish that he was harassed or discriminated against by his supervisors or others.¹⁹ Appellant alleged that supervisors made statements and engaged in actions which he believed constituted harassment and discrimination, but he provided no corroborating evidence, such as witness statements, to establish that the statements actually were made or that the actions actually occurred.²⁰ The record contains a statement in which a witness attributed various comments about appellant’s emotional state to Mr. Wert. However, there is no indication, and appellant does not claim, that he was present when these ostensible comments were made. Thus, he has not established a compensable employment factor under FECA with respect to the claimed harassment and discrimination.

For the foregoing reasons, appellant has not established any compensable employment factors under FECA and, therefore, has not met his burden of proof in establishing that he sustained an emotional condition in the performance of duty. He may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

¹⁷ See *supra* notes 6 through 8.

¹⁸ Appellant alleged that he received improper treatment from employing establishment physicians, but he did not provide evidence to support this assertion or adequately explain how such a matter was related to his employment.

¹⁹ See *Joel Parker, Sr.*, 43 ECAB 220 (1991) (finding that a claimant must substantiate allegations of harassment or discrimination with probative and reliable evidence).

²⁰ See *supra* notes 9 and 10.

CONCLUSION

The Board finds that appellant did not meet his burden of proof to establish that he sustained an emotional condition in the performance of duty.

ORDER

IT IS HEREBY ORDERED THAT the June 9, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 12, 2015
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board